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IN THE

Supreme Court of the United States

No. 753. **October Term, 1936.**

AETNA INSURANCE COMPANY,
Petitioner,

v.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

No. 754. **October Term, 1936.**

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY,
Petitioner,

v.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

No. 755. **October Term, 1936.**

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED,
Petitioner,

v.

JOHN M. KENNEDY, 3d, to the Use of ANNA L. BOGASH,
Respondent.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

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v.

JOHN M. KENNEDY, 3RD, TO THE USE OF ANNA L. BOGASH,

Respondent.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners above named (defendants below) pray that writs of certiorari issue to review the judgments and decrees of the Circuit Court of Appeals for the Third Circuit entered on January 29, 1937, denying petitions for rehearing and remanding the above cases to the District Court with direction to enter judgments for respondent (plaintiff below).

These judgments and decrees constituted, in effect, a reversal of the prior judgments of the Circuit Court of Appeals entered on January 16, 1936 remanding the cases for new trial.

These judgments also reversed the judgments of the District Court for the Eastern District of Pennsylvania entered upon verdicts of a jury in favor of your petitioners (defendants below) (Rec. pp. 183, 184, 185).

QUESTIONS PRESENTED.

The primary questions presented in these cases concern your petitioners' right to trial by jury under the Seventh Amendment of the Constitution, which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The questions are:

1. Did the parties waive their right to trial by jury by submitting to the trial court requests for directed verdicts, although at the same time they submitted numerous other points for charge?

2. Did the Circuit Court of Appeals, after a case has been submitted to a jury below, without reservation of any points of law, deny the right to trial by jury when it reversed verdicts and judgments in favor of petitioners and directed the entry of judgments in favor of respondent?

In order to properly dispose of the cases, certain subsidiary questions must be considered. These are as follows:

1. Was there sufficient evidence to go to a jury on the question of respondent's consent to the cancellation of the insurance policies involved in this suit?

2. Assuming there was sufficient evidence of consent to cancellation, was it necessary for the insurance companies to give formal notice of cancellation thereafter?

STATEMENT OF THE CASE.

These cases are identical and were tried together below. They arise out of a fire in an old brewery property. Respondent, Kennedy (legal plaintiff below) held a first mortgage on the property. The Corn Exchange National Bank held a second mortgage and had taken out fire insurance policies with your petitioners (defendants below) on the property. The policies provided (Rec. p. 74):

> "It is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank & Trust Co. The premium being paid by the Corn Exchange National Bank & Trust Co., it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank & Trust Co. and paid to them and John M. Kennedy, 3rd, Mortgagee, as interest may appear."

They also provided that the insurance companies might cancel on ten days' notice (Rec. p. 75).

The Corn Exchange National Bank decided to abandon its interest as worthless. It went to the respondent, Kennedy, advised of its intention to cancel the policies, and suggested he take them over. Kennedy stated that he would not take the policies over and that the Bank might do with them what it thought best. He was subsequently advised several times that the policies would be cancelled and raised no objection. (For a report of the testimony see the evidence of Kennedy (Rec. p. 111) and Winnet (Rec. pp. 147 to 150), and the opinions of the Circuit Court of Appeals (Rec. pp. 201-221).)

The Bank surrendered the policies for cancellation and the unearned premium for the unexpired term was paid to it February 27, 1932 (Rec. pp. 126-127). The Bank had paid the premiums on the policies at the time they were written (Rec. p. 130). Sometime thereafter, to wit, March 25, 1932 (Rec. p. 9) the brewery burned. After the fire Bogash, the use plaintiff, bought respondent's interest and commenced the present actions against your petitioners on the insurance policies.

The cases proceeded to trial together. At the trial both sides presented elaborate points for charge including, among others, requests for directed verdicts (Plaintiff's points, Rec. pp. 172 to 175; Defendants' points, Rec. pp. 175 to 178). The court refused both motions for directed verdicts and, without reserving any questions of law, submitted the cases to the jury. The jury found in favor of your petitioners (Rec. p. 178). Respondent filed a motion for a new trial in each of the cases (Rec. pp. 1, 3, and 5). There was no motion filed by respondent for judgment in his favor. The motions for new trial were dismissed (See opinion of

trial judge, Rec. pp. 180 to 183), and judgments were entered on the verdicts. The respondent appealed to the Circuit Court of Appeals. On January 16, 1936, the Circuit Court of Appeals reversed and remanded the cases for a new trial on the ground that the District Court failed to sufficiently emphasize to the jury the clauses in the insurance policies with respect to notice of cancellation. It directed the case should be sent back for retrial so that the jury might pass on whether respondent had both consented to cancellation and waived his alleged right to notice of cancellation (Rec. p. 204).

Your petitioners, convinced that a person who had consented to cancellation was not entitled to formal notice of his own act, and that the notice clause was applicable only where the policies were cancelled at the instance of the insurance companies, and convinced that the question of consent to cancellation had been adequately presented to the jury, thereupon presented petitions for rehearing, in accordance with Rule 27 of the Circuit Court of Appeals, permitting one rehearing within sixty (60) days of final judgment.

One year later and long after the term had expired, the Circuit Court of Appeals denied the petitions for rehearing. It nevertheless changed its prior opinion completely and held there was not sufficient evidence to go to the jury on the question of consent to cancellation. It also held that the parties had waived their right to trial by jury by submitting requests for directed verdicts, although at the same time they submitted numerous other points for charge. It thereupon, purportedly on the authority of:

BALTIMORE & CAROLINA LINE v. REDMAN, 295 U. S. 654,

proceeded to direct the entry of judgments for respondent.

Wherefore your petitioners are now before this court.

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that the parties waived their right to trial by jury by submitting to the trial court requests for directed verdicts, although at the same time they also submitted numerous other points for charge.

2. In holding that, although the cases had been submitted to the jury below without the reservation of any points of law, it had the power to reverse the judgments in favor of your petitioners and direct the entry of judgments in favor of respondent.

3. In directing the entry of judgments for respondent and thereby denying your petitioners right to trial by jury.

4. In holding that there was not sufficient evidence on the question of consent to cancellation of the insurance policies to go to the jury.

5. In holding that regardless of consent to cancellation, respondent was thereafter entitled to formal notice of his own act of cancellation and that the trial court did not fairly present this matter to the jury.

6. In holding that the clause in the policies requiring notice of cancellation was applicable in this case where the companies did not seek to cancel the policies of their own initiative.

REASONS FOR GRANTING THE WRITS.

1. The decision of the Circuit Court of Appeals holding that the submission by the parties to the trial court of numerous points for charge including, among others, mo-

tions for directed verdicts, amounted to a waiver of the right to trial by jury, is in conflict with and a serious misapplication of the decision of this court in:

WILLIAMS v. VREELAND, 250 U. S. 295.

The decision is also in conflict with the decisions of the other Circuits decided since WILLIAMS v. VREELAND, supra, and applying the same. These decisions are as follows:

BANK OF UNION v. FIDELITY & CASUALTY CO. OF N. Y., 62 Fed. (2d) 1040 (C. C. A. 8);

W. A. HOVER & CO. v. DENVER & RIO GRANDE W. RAILROAD CO., 17 Fed. (2d) 881 (C. C. A. 8);

UNDERWRITERS FINANCE CORP. v. UNION INDEMNITY CO., 61 Fed. (2d) 865 (C. C. A. 7).

2. The decision of the Circuit Court of Appeals holding that, although no questions of law were reserved below when the cases were submitted to the jury, it had the power to reverse judgments in favor of your petitioners and enter judgments in favor of the respondent is in conflict with:

SLOCUM v. NEW YORK LIFE INSURANCE CO., 228 U. S. 364,

and a serious misapplication of the decision of this Court in:

BALTIMORE & CAROLINA LINE v. REDMAN, 295 U. S. 654.

The decision is also in conflict with the decisions of the other Circuits decided since BALTIMORE & CAROLINA LINE v. REDMAN, supra, and applying the same. These decisions are as follows:

WOLFE v. PENNSYLVANIA RAILROAD, 82 Fed. (2d) 164 (C. C. A. 2);

HEFFNER v. PENNSYLVANIA RAILROAD COMPANY, 81 Fed. (2d) 28 (C. C. A. 2);

THOMSON v. DOWNEY, 78 Fed. (2d) 487 (C. C. A. 7).

Your petitioners earnestly submit that the orders of the Circuit Court of Appeals constituted denials of your petitioners' right to trial by jury under the Seventh Amendment. Your petitioners further feel that it would be particularly appropriate to review these cases because the two errors above noted are far-reaching and will lead to numerous similar denials of the right to jury trial, to say nothing of the injustice done to your petitioners.

WHEREFORE, petitioners pray that this Court may issue its writs of certiorari to review the decision of the Court below.

AETNA INSURANCE COMPANY,
SPRINGFIELD FIRE & MARINE INSURANCE COMPANY, and
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED,
By HARRY S. AMBLER, JR.,
HORACE M. SCHELL,
ROBERT T. MCCRACKEN,
Their Attorneys.

Brief in Support of Petition.

OPINIONS BELOW.

The opinion of the District Court sur motion for new trial filed February 11, 1935, is printed in the Record at page 180 and is not reported.

The original opinion of the Circuit Court of Appeals, filed January 16, 1936, is printed in the Record at page 201, and is not yet reported.

The opinion of the Circuit Court of Appeals sur petition for rehearing, filed January 29, 1937, is printed in the Record at page 221, and is not yet reported.

JURISDICTION.

The original decision of the Circuit Court of Appeals for the Third Circuit was rendered January 16, 1936. Petitions for rehearing were promptly presented on January 29, 1936, in accordance with Rule 27 of the Circuit Court of Appeals and the decision denying the petitions for rehearing was rendered on January 29, 1937.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the JUDICIAL CODE, as amended.

OUTLINE OF ARGUMENT.

The statement of the case, supra, sets forth the pertinent facts. This argument is confined to the question of the propriety of granting the present writs of certiorari. It considers briefly the question of the right to trial by jury and the question of the waiver of that right. It concludes by pointing out that the only issue in the cases, namely, the question of consent to the cancellation of insurance policies, was fairly presented to the jury, and it submits that this Court can properly remedy the errors of the Circuit Court of Appeals by reversing the judgments of that Court and reinstating the judgments of the District Court.

ARGUMENT.

1. Right to Trial by Jury.

We earnestly submit that your petitioners have been deprived of their right to trial by jury guaranteed by the Seventh Amendment. It will be recalled that at the trial these cases were submitted to the jury without qualification and without the reservation of any points of law and that the jury rendered verdicts for your petitioners. In spite of this, the Circuit Court when it denied rehearing, undertook to reverse the judgments of the District Court entered on the verdicts and to direct judgments for the respondent on the ground that there was not sufficient evidence to go to the jury on the question of consent to cancellation, notwithstanding the fact that the only matters before the Court were respondent's motions for new trial.

This practice was, we believe, specifically condemned in:

SLOCUM v. NEW YORK LIFE INSURANCE COMPANY, supra.

In that case this Court pointed out that at common law after a case had been submitted without qualification to a jury, it was impossible for any court thereafter to overthrow the verdict and enter judgment for the opposite party on the ground that there was not sufficient evidence to go to the jury. The Court pointed out that at common law it was necessary under such circumstances to send the case back for a new trial. The Court further held that the Seventh Amendment guaranteed the preservation of common law forms and that, consequently, a Federal Court was without power to overthrow a verdict and judgment in favor of one party and enter it in favor of the other. The doc-

trine of this case, we submit, is directly applicable here and conclusively indicates that the Circuit Court in directing judgments for the respondent, exceeded its powers under the Constitution.

The Circuit Court, in rendering the decrees, relied upon

BALTIMORE & CAROLINA LINE v. REDMAN, supra.

In that case, however, the trial court, did not submit the case to the jury without qualification. In accordance with a well recognized common law practice, it reserved its decision as to the sufficiency of evidence and on other questions of law when it submitted the case to the jury. Solely because of these reservations, this Court permitted the reversal of the judgment entered on the verdict and the entry of a judgment for the opposing party. We believe the Court was careful to qualify, and not to overrule, the Slocum Case and that the Court did not intend to sanction orders such as those made by the Circuit Court under the circumstances existing in these cases.

We are confirmed in this view by the decisions of the Seventh and Second Circuits. These decisions are as follows:

THOMSON v. DOWNEY, 78 Fed. (2d) 487;
HEFFNER v. PENNSYLVANIA RAILROAD COMPANY, 81 Fed. (2d) 28;
WOLFE v. PENNSYLVANIA RAILROAD COMPANY, 82 Fed. (2d) 164.

The following statement from THOMSON v. DOWNEY, supra, is typical of these holdings (page 491):

> "In Baltimore & Carolina Line v. Redman, 55 S. Ct. 890, 79 L. Ed. —, decided by the Supreme Court on June 3, 1935, the Court held that, where the trial

court had reserved its rulings until after the verdict on motions to dismiss for lack of evidence, and for peremptory instruction, and after the verdict had held the evidence sufficient and the motions ill-grounded, and accordingly entered a judgment for plaintiff on the verdict, then the Circuit Court of Appeals was warranted upon reversal of judgment for the plaintiff in directing the trial court to dismiss the declaration. In this case, however, the trial court did not reserve its rulings on motions to dismiss and for a directed verdict, but promptly overruled them before instructing the jury. The Redman Case, therefore, is not authority for us to direct a judgment of dismissal."

It is unfortunate, we believe, to have confusion on such a fundamental question of practice, as well as a great hardship to your petitioners.

2. Waiver of the Right to Trial by Jury.

The Circuit Court suggests that your petitioners waived their right to trial by jury. We are frank to confess that we do not know how seriously the Circuit Court relied upon this proposition. However, the Court undoubtedly makes the suggestion that, because both sides submitted points for charge including among them requests for directed verdicts, there was a waiver of the right to go to a jury. (In this connection see Record pp. 172-178, where it appears that both parties submitted at least a dozen points for charge, concluding with requests for directed verdict.) This is the common practice in practically every jury trial case. No one ever imagined that the submission of points for charge in this manner constituted a waiver of a right to trial by jury.

Nor did this Court ever suggest that such was the case.

In:

WILLIAMS v. VREELAND, supra,

the Court held that if both parties asked for directed verdicts and did nothing more (i. e. did not submit other points for charge) they might be deemed to have waived their right to trial by jury. The case obviously has no application here.

Our view in this respect is confirmed by a number of decisions from the other Circuits which point out this limitation on Williams v. Vreeland and which, incidentally, are in direct conflict with the present decision. In this connection see:

BANK OF UNION v. FIDELITY & CASUALTY CO. OF N. Y., 62 Fed. (2d) 1040 (C. C. A. 8);

UNDERWRITERS FINANCE CORP. v. UNION INDEMNITY CO., 61 Fed. (2d) 865 (C. C. A. 7);

W. A. HOVER & CO. v. DENVER & RIO GRANDE W. RAILROAD CO., 17 Fed. (2d) 881 (C. C. A. 8).

The following is a typical statement from:

BANK OF UNION v. FIDELITY & CASUALTY CO. OF N. Y., supra, (page 1041):

> "Ordinarily, where both parties move for a directed verdict without reservations, it amounts to a waiver of a jury trial, and a submission to the court of questions of fact as well as of law. Beuttell v. Magone, 157 U. S. 154, 15 S. Ct. 566, 39 L. Ed. 654; Williams v. Vreeland, 250 U. S. 295, 39 S. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038. But, where a party makes such motion, and at the same time requests instructions to the jury which show he does not intend to waive his right to jury trial if his motion is overruled, he cannot be held to have waived a trial by jury of the fact questions."

Under these cases it is clear there was no waiver of the right to trial by jury. Again, we believe it appropriate to grant review because this represents a fundamental misunderstanding of WILLIAMS v. VREELAND, supra, which may very well lead to confusion in numerous future cases tried before juries.

3. Affirmance of Judgment of District Court Suggested.

We submit, finally, that the fundamental errors in these cases which culminated in the denial of your petitioners' right to trial by jury can be appropriately remedied by reversing the decrees of the Circuit Court and affirming the judgments of the District Court.

The sole issue in these cases was whether or not respondent had consented to the cancellation of the insurance policies sued upon. This matter was fairly submitted to the jury and they found in your petitioners' favor. Under the circumstances, there is no need for a new trial.

The suggestion that there was not sufficient evidence of consent for the jury to find in your petitioners' favor is, we believe, without merit. The District Court clearly felt there was sufficient evidence. The Circuit Court did also, as evidenced by its first opinion. The testimony as to consent is fully set forth in the Record pp. 111, 147 to 150. This evidence was not disputed and established that respondent had been advised of the second mortgagee's intention to cancel the policies. He refused to take them over and gave the second mortgagee permission to do what it pleased with them. He was subsequently advised further of the second mortgagee's intention to cancel and raised no objection. The jury from this conduct could clearly infer that respondent had unqualifiedly consented to cancellation.

In its first opinion, the Circuit Court, while conceding the above, suggested the cases should be sent back to the jury, to pass on whether respondent's conversations constituted a waiver of the right to notice of cancellation. This suggestion is clearly erroneous. A man who has consented without qualification to cancellation clearly does not expect to receive formal notice of his own act and there was no necessity of the jury passing on that question. As a matter of fact, the Circuit Court relies for its position on a clause in the policies which had no application. The clause providing for cancellation on notice was inserted solely to permit the insurance companies to terminate the policies of their own initiative in the event that they no longer desired to carry the risk. It was never intended to apply to cases in which the insured undertook to cancel the policies. It has never been said that a policy of insurance cannot be cancelled by mutual consent. (For authorities see Petition for Reargument, Rec. pp. 213 to 216.)

The sole issue, we repeat, was whether the respondent had consented to cancellation and this factual issue was fairly presented to the jury, who found in your petitioners' favor. Under the circumstances, we believe that a correction of the Circuit Court's errors in practice and the rendition of substantial justice in these cases will be expeditiously achieved by a reversal of the judgments of the Circuit Court and the affirmance of the judgments of the District Court.

Respectfully submitted,

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